SIA SOON SUAN v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and Ismail Khan J.) September 15, 1965]

[K.L. — Federal Court Criminal Appeal No. 36 of 1965]

Internal Security Act, 1960, s. 57(1)(b) — Charge of having without lawful excuse hand grenades and ammunition — No link to show that hand grenades and ammunition found in appellant's possession were those received at police station and later sent for examination — Duty of appellate court.

Criminal Procedure — Prosecution evidence — Gap in — Requirement of strict proof.

The appellant an Indonesian infiltrator was charged for having without lawful excuse hand grenades and ammunition in the security area as proclaimed by the Yang di-Pertuan Agong under section 57(1)(b) of the Internal Security Act, 1960.

The evidence against him was that he was captured by two men (P.W.4 and P.W.11) of the Royal Malay Regiment and that from the pockets of his trousers they recovered the hand grenades and ammunition in the presence of military and special branch officers. The appellant was then escorted in a land rover to Pontian police station by P.W.4 and P.W.11. P.W.4 said in evidence that he handed the hand grenades and ammunition to one A.S.P. Zainal Abidin but the latter denied this. A.S.P. Zainal Abidin stated in evidence that he was handed a large quantity of arms and ammunition which were already grouped. P.W.11 had no knowledge as to whom the hand grenades and ammunition had been handed. On this evidence the learned trial judge held that P.W.4 had made an honest mistake as to identity although this was not conceded by either P.W.4 or the prosecution. The learned judge then convicted the appellant and sentenced him to death. On appeal,

Held: (1) a strict analysis of the evidence made it clear that not one jot of evidence was produced by the prosecution to support the evidence of P.W.4 that the hand grenades and ammunition were in fact handed in at Pontian police station;

(2) since the evidence of handing over the grenades and ammunition to the police depended entirely on the evidence of P.W.4 alone and he was contradicted by A.S.P. Zainal Abidin it can hardly be said that the prosecution had proved by evidence beyond all reasonable doubt that the articles allegedly found on the person of the appellant were handed over to the police and that these were the very same articles located in one of the groups;

(3) the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed.

FEDERAL COURT.

T. T. Rajah for the appellant.

Salleh bin Abbas (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye Ag.C.J. (Malaya): The appellant was tried in the High Court at Johore Bahru on the following charges:

(1) "That you at about 6.00 a.m. on the 17.8.64 in the Security Area as proclaimed by the Yang di-Pertuan Agong vide FLN. 243 of 13th August, 1964 namely Kg. Hospital, Pontian Besar, in the District of Pontian, in the State of Johore, without lawful excuse had under your control a firearm, to wit, one rifle without lawful authority and that you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960."

(2) "That you at about 1.35 p.m. on the 17.8.64, in the Security Area as proclaimed by the Yang di-Pertuan Agong vide FLN. 243 of the 13th August, 1964 namely Kg. Hospital, Pontian Besar, in the District of Pontian, in the State of Johore, without lawful excuse had under your control ammunitions, to wit, 2 handgrenades and 35 rounds of .303 ammunition without lawful authority and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960."

At the close of the prosecution the Deputy Public Prosecutor conceded that there was no case to answer on the first charge. Thereupon the appellant was formally acquitted of such charge. Counsel for the appellant next submitted that there was no case to answer on the second charge. The learned trial judge, however, ruled otherwise and the appellant proceeded to make his statement from the dock, which was simply a denial that he had anything on his person other than a sum of $106. He called no witness, but counsel on his behalf then made an application to recall A.S.P. Zainal Abidin (P.W.7) for further cross-examination, the object and purpose of which was said to be "further clarification as to the arms and ammunitions." The application was rejected by the learned trial judge on the ground that "the purpose of calling for the witness was to show that there was a flaw in my reasoning as to the evidence with reference to the handing over of the exhibits." Counsel having nothing further to say except to quote from *Gour* (6th Ed.) Vol. 3 at p. 1730, the trial judge found the appellant guilty and having convicted him, passed sentence of death according to law.

The appellant now appeals against his conviction on various grounds. Broadly speaking they are: (i) that the prosecution had failed to establish the vital connecting link between the handgrenades and ammunition alleged to have been found by the two soldiers in the appellant's trousers and those subsequently examined by the ammunition technician (P.W.3) and the armament officer (P.W.6); (ii) that in the context of the whole of the prosecution evidence, the evidence of the same soldiers should not have been held as adequate to fill the *lacunae* therein in material particulars and (iii) that the refusal of the application by the defence to recall the witnesses for further cross-examination ought to raise doubts as to the possibility or probability of a miscarriage of justice.

The evidence may be summarised as follows: Immediately after information received of the sea-borne landing of Indonesian infiltrators in Pontian on August 17, 1964, a platoon of the 6th Battalion of the Royal Malay Regiment went

into action. At about 1.35 p.m. on the same day Private 10518 (P.W.4) and Private 13540 (P.W.11) captured a man whom they identified as the appellant. From the pockets of his trousers they alleged that P.W.4 recovered 35 rounds of .303 ammunition and 2 handgrenades. The finding, according to them, was witnessed by Lieutenant Badaruddin, Corporal Ramli and a special branch officer. To quote them *ipsissima verba* P.W.4 said, "After capture . . . my officer, Cpl. Ramli and the special branch man came to us. While I was examining the accused's person the others arrived," and P.W.11 deposed that "whilst accused was being searched by P.W.4 Lt. Badaruddin, the Corporal and the special branch man were also present and witnessed the search."

The two soldiers then escorted the appellant in a land rover to the Pontian police station where, to quote P.W.4 again:

"I saw all the police officers now in witness room (shown A.S.P. Zainal Abidin and Inspector Yean Yoke Khin). The short man (meaning A.S.P. Zainal Abidin) was there when I placed the handgrenades on the floor. A.S.P. Zainal picked them up . . . I spoke to A.S.P. Zainal before I placed the handgrenades on the floor. I also placed the ammunition on the floor — the ammunition I recovered from accused.'

Now, P.W.11 had "accompanied P.W.4 to the police station on the day of the capture". He said he actually "went up to Pontian police station — took accused with P.W.4 to the police station" but "I did not see them (i.e., the handgrenades and ammunition) whilst in the vehicle on the way to the police station." Nor did he ever see them later. There is nothing in his evidence on the record to corroborate P.W.4 as regards the handgrenades and ammunition being produced at the police station and turned over to any police officer there. After their alleged finding on the person of the appellant all this lethal ironmongery appeared to have vanished beyond the ken of P.W.11, although these were not minute objects which could have escaped notice in the process of being put away or produced or handed over by P.W.4.

Of the delivery into police custody the learned trial judge said as follows:

"P.W.4 identified Zainal Abidin as the person to whom he handed over the grenades, but Zainal Abidin denied this. I have no doubt Che Zainal Abidin was telling the truth. Would the result be regarded as showing that P.W.4 was lying? The important question is: Did P.W.4 hand over the handgrenades to the police? In my view he did but he wrongly identified the police officer who received them."

The learned trial judge thus believed that the witness had made an honest mistake. Neither P.W.4 nor the Deputy Public Prosecutor, however, conceded or even suggested that there had been any mistake. On the contrary, P.W.4 categorically asserted, in terms that left no room for the alternative explanation of a simple mistake, that in truth and in fact Zainal Abidin not only was the very person to whom he had handed over the hardware but, for added emphasis, he had also spoken to this A.S.P. before placing the handgrenades on the floor.

Assuming, if we must, that some other police officer did receive those things from P.W.4, the only possible person, in that event, whom the prosecution was able to produce was Acting A.S.P. Abdul Khalid (P.W.10) who, on August 17, was the O.C.P.D. in Pontian, and of whom the learned trial judge said:

"Che Abdul Khalid said that he remembered that whenever an infiltrator was brought together with the exhibits, the exhibits would be labelled, the labelling being done by his officers.".

Che Abdul Khalid's own evidence on this point was as follows:—

"I had to deal with so many things that day. I could not attend to all, but I remember that when the infiltrators were brought in and exhibits with them I would have labelled the exhibits. The actual labelling was done by other persons on my instructions."

The subjunctive mood in the words underlined and the sentence which followed must be taken to mean that he had no personal knowledge as to how the exhibits in this particular case were dealt with. He could, of course, say what the routine was, and he testified as to such routine procedure that he directed others to follow. He could not, however, and quite properly did not, assert any fact of which he had no personal knowledge, on mere hearsay. At any rate the point need not be pursued beyond the established fact that even the said routine was not followed with regard to the labelling, because A.S.P. Zainal Abidin stated that he was handed a large quantity of arms and ammunition, already grouped, and he then marked them himself Groups 1 to 13 but —

"When I came to police station the ammunition were already in groups. There were no markings to each group. I don't know how the handgrenades came into this group. I don't know how the ammunition came into this group. I don't know how the machine gun came into this group. I don't know how all those things came into this group."

The group referred to was group 13 which *ex facie* necessarily came from other captured persons and not exclusively from the appellant, if at all. The list speaks for itself, namely —

(1) a light machine gun.
(2) 302 rounds of .303 ammunition.
(3) 29 rounds of 9 mm.
(4) 3 handgrenades with detonators.
(5) 2 haversacks.
(6) one webbing and belt.
(7) one pair leather shoes.
(8) two pairs rubber shoes.
(9) one empty Browning magazine.

Then the A.S.P. went on to say that on August 18, 1964 he handed 3 handgrenades to P.W.5 and 35 rounds of the 303 ammunition to P.W.6, the armament expert.

A strict analysis of the evidence referred to above makes it clear that not one jot or tittle of evidence, in the true sense of that word, was produced by the prosecution to support the evidence of P.W.4 that the two handgrenades and 35 rounds of ammunition were in fact handed in at Pontian police station. In any act of transfer of possession there must of course be two parties. Who then was the transferee? Where, as in the instant case, such transfer was a vital piece of evidence — strenuously challenged as an issue of fact — there can be no gainsaying that the prosecution had to prove the delivery into police custody, not only of the prisoner, but the things allegedly found on his person as well. Possession of the articles being the very essence of the offence, production of such articles is naturally the best evidence. Where this was not done, what evidence had been offered in lieu? P.W.4 and P.W.11 testified to the finding and three responsible officers were alleged to be present, at least one of whom, Lieut. Badaruddin, was available as a material witness, being stationed near-by in Kluang. Being the senior officer on the spot, without whose order or permission P.W.4 and P.W.11 could not have left the scene, he must have known, being a witness to the alleged finding, whether or not in fact the handgrenades and ammunition were found on the person of the appellant. The failure of the prosecution to call such an important witness inevitably reminds one of the presumption that ordinary prudence requires to be raised, especially as these articles categorically alleged to have been handed over by P.W.4 to A.S.P. Zainal Abidin were shown by the prosecution evidence itself not to have been handed over to him.

The evidence of Acting A.S.P. Abdul Khalid helped in no way to fill in the *lacuna*. He clearly was not the police officer to whom P.W.4 handed the articles in question. He therefore could not have been able to identify anything at all. There was no evidence whatever as to how all sorts of military equipment came to be sorted out into 13 different groups, when A.S.P. Zainal Abidin arrived on the scene.

The learned trial judge stated that in his view, "having regard to the evidence, there could not have been any reasonable doubt that the 35 rounds of ammunition were the *same ones* found on the accused" and that "with reference to the handgrenades, all three were handed over to Sgt. Keane and he said they were of good serviceable condition, and so far as the serviceable condition of the handgrenades was concerned, does it matter *which two of the three* were actually the ones found on the accused's person?"

Since the evidence of handing over to the police depended entirely on the evidence of P.W.4 alone, and he was contradicted by A.S.P. Zainal Abidin, it can hardly be said that the prosecution had proved by evidence beyond all reasonable doubt that the articles allegedly found on the person of the appellant were handed over to the police, and what is even more pertinent, that these very same articles were the very ones located in group 13. No one, it is to be remembered, had been able to say how they came to be in that group. Even in that group, the machine gun, two extra pairs of shoes and various other items must have been taken from others, and not the appellant, as well as 267 rounds of .303 and one handgrenade. Why could not all the items in group 13 have come from others? To this question there was no answer.

For the reasons stated above, we have been compelled to differ, with the utmost respect to the learned trial judge, from his finding that the 35 rounds of .303 ammunition and 2 of the handgrenades taken for examination from group 13 were the same ones which were found in the appellant's possession. The link in the chain was broken by the evidence of A.S.P. Zainal Abidin, and the break had never been repaired so as in any manner to connect any article in group 13 with those allegedly found on the appellant. Had the learned trial judge not been satisfied as to the identity of these 35 rounds of .303 ammunition and the 2 handgrenades, we do not think he would have convicted the appellant of having them under his control earlier in the day.

In the circumstances, had counsel's application for further cross-examination of the prosecution witness been permitted, it might well have brought out into greater relief the break in the chain, so that it could not have been passed over. It is impossible for us to say that in the circumstances the denial of the application might not have occasioned a miscarriage of justice. We appreciate that on the day of the Pontian landing there must have been great confusion when routine procedural machinery was jammed, if not broken down by the rush of exciting and grave events. We must accordingly exonerate all police and military personnel as well as the public prosecutor's officers from any sort of blame for the flaws which had developed in the prosecution case. Nevertheless, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic. The directions that we give a jury are no less to be hearkened to by ourselves.

We accordingly allow this appeal and quash the conviction and sentence.

Appeal allowed.

LUK DAI CHUNG v. NGU EE NGUOK

[A.C.J. (Lee Hun Hoe J.) September 16, 1965]

[Sibu — Civil Appeal No. 10 of 1965]

Practice and Procedure — Appeal — Question of fact — Principles governing.

Hwei — Claim against head of hwei — No default by any member.

In hearing an appeal from the decision of a judge sitting without a jury, involving questions of fact an appellate court is guided by certain principles. In *Watt* v. *Thomas* (1) Lord Thankerton stated thus: (1) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

This was an appeal against the decision of the magistrate dismissing the appellant's claim against the respondent, who was alleged to be the head of a "hwei". The appeal was based mainly on questions of facts. The respondent denied liability as she stated she had settled the amount claimed. It was not alleged that any member of the "hwei" had defaulted.

Held: there was no reason in this case to upset the decision of the magistrate who had held that the appellant had not established his claim on a balance of probabilities and who had the advantage of seeing and hearing the witnesses.

Cases referred to:—

(1) *Watt* v. *Thomas* [1947] 1 All E.R. 582, 587; [1947] A.C. 485, 487.

(2) *Tang Siew Hee and others* v. *Hii Sii Ung* [1964] M.L.J. 385.

(3) *Ngu Ee Nguok* v. *Lee Ai Choon* [1965] 1 M.L.J. 32.

(4) *Lee Pee Eng* v. *Ho Sin Leow* [1958] S.C.R. 18.

CIVIL APPEAL.

J. V. Nayar for the appellant.

Chong Siew Fai for the respondent.

Lee Hun Hoe J.: I dismissed the appeal with costs giving very brief reasons but intimated that reasons would be given more fully later.

There are four grounds of appeal. The last ground has no substance at all because the learned magistrate did not hold that respondent as head of the "hwei" was not liable for the debts owing from respondent to appellant. In fact he gave judgment for appellant for $100 in respect of a promissory note signed by the respondent. The first three grounds concern questions of fact.

In hearing an appeal from the decision of a judge, sitting without a jury, involving question of fact an appellate court is guided by certain principles. In *Watt* v. *Thomas* (1) Lord Thankerton in his speech stated thus:—

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

Counsel for appellant contended that respondent did not specifically deny that as head of the "huei" she was not liable. He referred to Order 19 rule 13. Although the form of the amended defence as drafted left much to be desired the substance is clear. Appellant cannot say that he had in anyway been taken by surprise. In effect respondent denied liability for the simple reason that she had settled the amount claimed.

If I may say so the learned magistrate had critically examined the evidence adduced by both parties and had given full reasons for his findings on the facts. Cases, such as, *Tang Siew Hee & others* v. *Hii Sii Ung* (2) and *Ngu Ee Nguok* v. *Lee Ai Choon* (3) were referred to him and carefully dealt with by him.

Both counsel referred to my statement in *Ngu Ee Nguok* v. *Lee Ai Choon*:—

> "The view that if a member defaults the head may be held liable must depend on evidence adduced before the court. The onus is on the person who alleged that the head was liable, in this case the respondent."

Counsel for appellant made it clear that the question of default of any member did not arise in this case. If that were so I cannot see why respondent should be sued as head of the "hwei".

The action was started by Madam Ling Siew Nga but when she passed away Luk Dai Chung